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In The

Supreme Court of the United States

October Term, 1970

No. ~~1025~~ 70-77

STATE OF NORTH CAROLINA,
Petitioner

v.

WAYNE CLAUDE RICE,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER, JOINED IN AND ADOPTED BY THE STATES OF ARIZONA, ARKANSAS, FLORIDA, INDIANA, KANSAS, KENTUCKY, MAINE, MARYLAND, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, TEXAS, UTAH, VIRGINIA.

ROBERT MORGAN
Attorney General of the State
of North Carolina

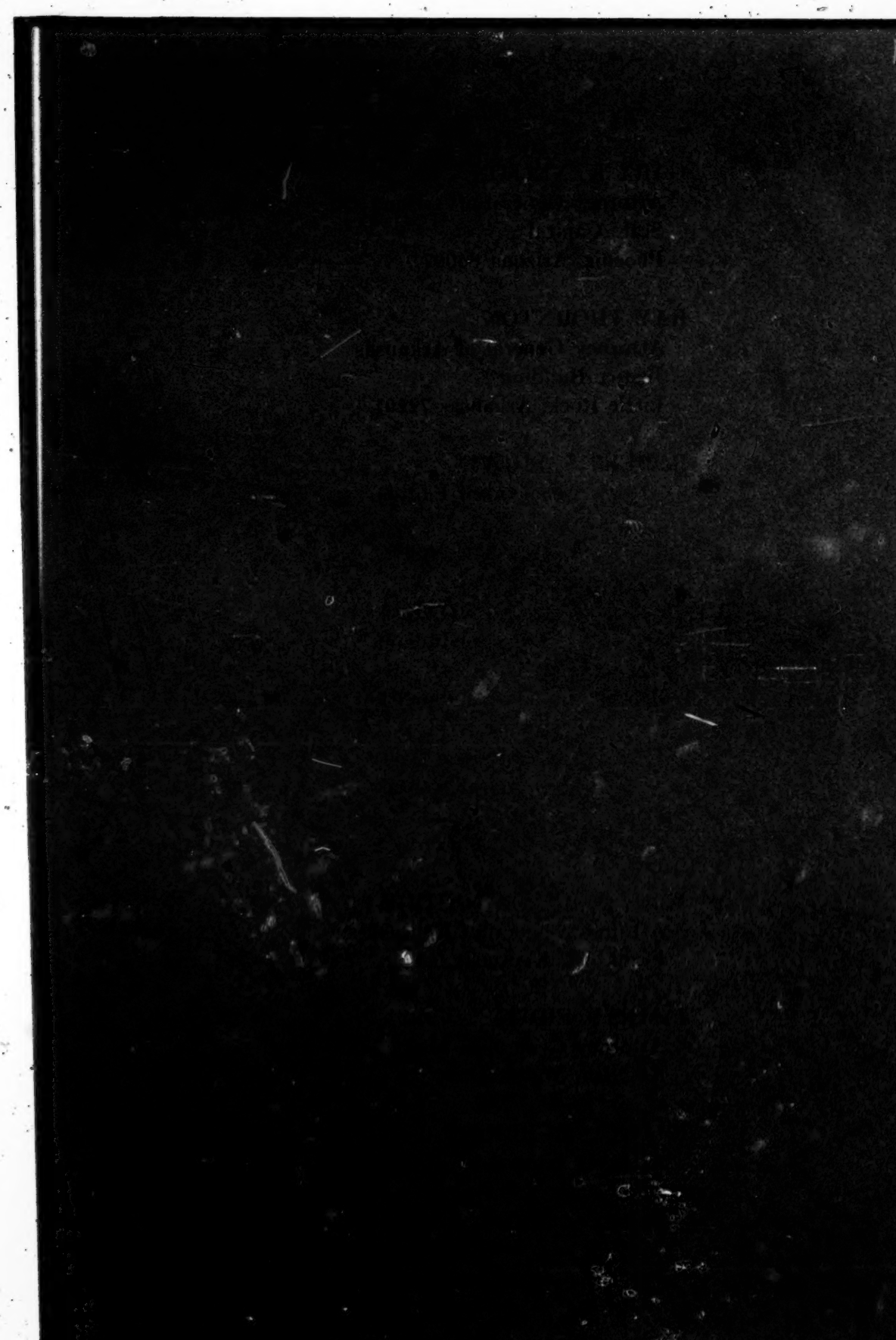
JACOB L. SAFRON
Assistant Attorney General

EDWARD L. EATMAN, JR.
Staff Attorney

Post Office Box 629
Justice Building
Raleigh, North Carolina 27602
Telephone: 829-7188

Attorneys For Petitioner

(The names of attorneys appearing for *amici curiae* are listed inside.)



GARY K. NELSON
Attorney General of Arizona
State Capital
Phoenix, Arizona 85007

RAY THORNTON
Attorney General of Arkansas
Justice Building
Little Rock, Arkansas 72201

ROBERT L. SHEVIN
Attorney General of Florida
The Capital
Tallahassee, Florida 32304

THEODORE L. SENDAK
Attorney General of Indiana
State House
Indianapolis, Indiana 46204

VERN MILLER
Attorney General of Kansas
State Capital Building
Topeka, Kansas 66612

JOHN B. BRECKINRIDGE
Attorney General of Kentucky
Frankfort, Kentucky

JAMES S. ERWIN
Attorney General of Maine
Augusta, Maine 04330

FRANCIS B. BURCH
Attorney General of Maryland
One Charles Center
Baltimore, Maryland 21201

A. F. SUMMER
Attorney General of Mississippi
Jackson, Mississippi 39205

ROBERT L. WOODAHL
Attorney General of Montana
Helena, Montana 59601

CLARENCE A. H. MEYER
Attorney General of Nebraska
Lincoln, Nebraska 68509

HELGI JOHANNESON
Attorney General of North Dakota
Bismarck, North Dakota 58501

CRAWFORD C. MARTIN
Attorney General of Texas
Austin, Texas 78711

VERNON B. ROMNEY
Attorney General of Utah
State Capital
Salt Lake City, Utah

ANDREW P. MILLER
Attorney General of Virginia
Supreme Court Building
Richmond, Virginia 23219

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as WAYNE CLAUDE RICE v. STATE OF NORTH CAROLINA, 434 F. 2d 297 (4th Cir. 1970).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1). The Petition for a Writ of Certiorari was granted on April 5, 1971.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

DOES THE IMPOSITION OF A GREATER SENTENCE UPON JURY TRIAL AND CONVICTION WHEN THE ACCUSED EXERCISED HIS UNFETTERED AND ABSOLUTE RIGHT TO A TRIAL *DE NOVO* BEFORE A JURY IN THE SUPERIOR COURT, UPON "APPEAL" FROM A STATE DISTRICT COURT CONVICTION, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

(I) The Fourth Circuit Court of Appeals erred in equating an "appeal" from the State District Court to the State Superior Court with a defendant's "right of appeal" from a trial court to the appellate court: The Superior Court is not an appellate court for the District Court.

(II) The Fourth Circuit Court of Appeals opinion in RICE v. NORTH CAROLINA, 434 F. 2d 297 (4th Cir. 1970) raises serious problems affecting the structure of criminal justice in a significant number of states.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari by the State of North Carolina from a decision of the United States Court of Appeals for the Fourth Circuit granting Wayne Claude Rice habeas corpus relief and requiring the expunction of the record of his conviction. 28 U.S.C. § 2241, et seq.

Wayne Claude Rice was arrested on July 2, 1968, on a charge of driving under the influence of alcohol. He was tried in the General County Court of Buncombe County, North Carolina, on July 19, 1968, at which time he entered a plea of not guilty. He was found guilty and sentenced to a term of 9 months imprisonment suspended upon payment of a $100 fine and cost. Rice "appealed" the General County Court Judgment to the Superior Court of Buncombe County for trial *de novo* pursuant to North Carolina General Statutes §§ 15-177

and 15-177.1, now provided for in North Carolina General Statute 7A-290 in North Carolina's new District Court system:

> "In all cases of appeal to the Superior Court in a criminal action from a justice of the peace or other inferior court, the defendant shall be entitled to a trial anew and *de novo* by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon." N.C.G.S. 15-177.1.

> "Any defendant convicted in a District Court before the magistrate may appeal to the District Court for a trial *de novo* before the District Court Judge. Any defendant convicted in a District Court before the Judge may appeal to the Superior Court for trial *de novo*. . . ." N.C.G.S. 7A-290.

As a result of Rice's "appeal", the case was duly filed in the Superior Court of Buncombe County for trial *de novo*. On August 2, 1968, Rice was tried before a jury in the Buncombe County Superior Court, Honorable Francis O. Clarkson, Judge Presiding, found guilty of driving under the influence and sentenced to a term of two years. He did not appeal the conviction and sentence. On August 2, 1968, Rice was also tried in the Buncombe County Superior Court upon his "appeal" for trial *de novo* upon twelve charges of uttering worthless checks. He plead guilty and was sentenced by Judge Clarkson to 12 consecutive 30-day terms of imprisonment. (The sentences were concurrent with the sentence imposed for driving under the influence of alcohol.) Rice thereafter filed a Petition for Post Conviction Review on September 6, 1968, pursuant to the provisions of the North Carolina Post Conviction Hearing Act, N.C.G.S. 15-217, et seq. After a hearing, an Order was entered by the Honorable W. K. McLean, Judge Presiding, denying post conviction relief, and continuing the appointment of Dennis Winner, Esquire, court-appointed counsel, to petition the North Carolina Court of Appeals for a Writ of Certiorari to review Judge McLean's Order denying post con-

viction relief. On November 22, 1968, Rice withdrew his notice of appeal, and did not file a Petition for Writ of Certiorari to the North Carolina Court of Appeals until after the decision of the Federal District Court, *infra*. On November 25, 1968, Rice escaped from the custody of the North Carolina Department of Correction, and remained on escape until captured November 27, 1968. On December 6, 1968, Rice was convicted of escape in the Buncombe County General Court and sentenced to a term of 4 months to begin at the expiration of the sentences imposed upon conviction of driving under the influence of alcohol and uttering worthless checks. On December 11, 1968, Rice filed an Application for Writ of Habeas Corpus in the United States District Court for the Western District of North Carolina, which was denied by Memorandum and Opinion filed December 24, 1968, by Chief Judge Woodrow W. Jones of the United States District Court for the Western District of North Carolina, upon the ground that Rice had failed to exhaust his available State remedies and upon the further ground that the Application asserted no claim upon which relief could be granted. On January 6, 1969, Rice filed Notice of Appeal in the United States District Court for the Western District of North Carolina, and on December 8, 1969, a Certificate of Probable Cause was signed by John D. Butzner, Jr., Judge of the United States Court of Appeals for the Fourth Circuit. On December 10, 1969, Rice completed service of the sentence imposed for driving while under the influence of alcohol and commenced service of the sentence imposed for escape, which he completed on January 24, 1970, and was thereupon completely discharged by the North Carolina Department of Correction.

Upon Rice's appeal to the United States Court of Appeals for the Fourth Circuit, it was held that ". . . the District Court was in error in dismissing for Rice's failure to complete the remedies available to him in the State Court. It would have been futile , . . ," and stated "on the strength of PEARCE (NORTH CAROLINA v. PEARCE, 395 U. S. 711 (1969)),

we again see the more drastic sentence on the second trial as a denial of Federal due process." The Court concluded its opinion by stating that ". . . the Court is not insensitive to the logical and persuasive argument to the contrary in LEMIEUX v. ROBBINS, 414 F. 2d 353 (1 Cir. 1969), cert. denied 397 U. S. 1017 (1970). Likewise we express deference to the opinion in EVANS v. CITY OF RICHMOND, 210 Va. 403, 171 S.E. 2d 247 (1969). *We simply disagree.*" (Emphasis added.)

Concluding that the sentence imposed upon Rice upon trial *de novo* in the Buncombe County Superior Court was a denial of federal due process, the Fourth Circuit Court of Appeals directed that ". . . Rice is not to be held to his conviction. He was completely discharged by North Carolina on January 24, 1970, but this did not moot the case on habeas corpus. Injurious consequences because of the conviction might still obtain. *We think Rice is entitled to expunction of the record of them.*" (Emphasis added.) RICE v. NORTH CAROLINA, 434 F. 2d 297, 300 (4th Cir. 1970).

On February 8, 1971, the State of North Carolina filed a Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit and on April 5, 1971, certiorari was granted.

ARGUMENT

THE IMPOSITION OF A GREATER SENTENCE UPON JURY TRIAL AND CONVICTION WHEN THE ACCUSED EXERCISED HIS UNFETTERED AND ABSOLUTE RIGHT TO A TRIAL *DE NOVO* BEFORE A JURY IN THE SUPERIOR COURT, UPON "APPEAL" FROM A STATE DISTRICT COURT CONVICTION, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

I.

The Fourth Circuit Court of Appeals erred in equating an "appeal" from the State District Court to the State

> Superior Court with a defendant's "right of appeal" from a trial court to an appellate court. The Superior Court is not an appellate court for the District Court.

In reliance of what it conceived to be the principles established in NORTH CAROLINA v. PEARCE, 395 U. S. 711 (1969), the Fourth Circuit has here held that the imposition of a greater sentence upon the exercise of the unfettered right of trial *de novo* is a denial of Federal due process. The decision of the Fourth Circuit Court of Appeals in *RICE* is in direct conflict with the decision of the First Circuit Court of Appeals in LEMIEUX v. ROBBINS, supra. In deciding RICE, the Fourth Circuit stated "We simply disagree." While acknowledging the "logical and persuasive arguments to the contrary in LEMIEUX," the Fourth Circuit declined to follow the First Circuit's reasoning. The Fourth Circuit also disagreed with the opinion of the Supreme Court of Virginia in EVANS v. CITY OF RICHMOND, supra. In concluding that PEARCE was applicable, the Fourth Circuit also disagreed with the Supreme Court of North Carolina. STATE v. SPENCER, 276 N. C. 535, 173 S.E. 2d 765 (1970); STATE v. SPARROW, 276 N. C. 499, 173 S.E. 2d 897 (1970). The Fourth Circuit failed to cite the decision of the Supreme Court of Michigan to the contrary. MICHIGAN v. OLARY, 382 Mich. 559, 170 N.W. 2d 842 (1969). Moreover, the Supreme Court of Maine in LEMIEUX v. MAINE, 240 A. 2d 202 (Me. 1968) and the Supreme Court of Nebraska in STATE v. STANOSHECK, 186 Neb. 17, 180 N.W. 2d 226 (1970), are also contrary to the position taken by the Fourth Circuit in RICE.

The Fourth Circuit Court of Appeals erred in equating the Superior Courts of North Carolina with appellate courts to review the proceedings of the State District Courts. There was no review whatsoever of the proceeding in the General County Court of Buncombe County when Rice's "appeal" was heard in the Buncombe County Superior Court. The matter was *de novo*. In the event Rice wished to appeal from the convic-

tion and sentence in the Buncombe County Superior Court, he could have done so by appealing to the North Carolina Court of Appeals. N.C.G.S. 7A-27(b):

Pearce was tried and sentenced in a State Superior Court. His conviction was reversed on appeal after a successful attack on constitutional grounds and he was retried in the same Superior Court. Thus, he was clearly *retried* in a second court of record and of equal dignity with the court in which his first trial was held.

The language of this Court in PEARCE implies that the enunciated principle should be limited to the facts of that case. The problem before this Court concerned,

> "the constitutional limitations upon the imposition of a more severe punishment after conviction for the same offense upon *retrial*." 395 U.S. at 716.

Or, as otherwise stated,

> "what constitutional limitations there may be upon the general power of a judge to impose *upon reconviction* a longer prison sentence than the defendant originally received." 395 U.S. at 719.

The Court also refers to,

> "a man who is *retried* after his first conviction has been set aside . . . ." 395 U.S. at 722,

and condemns the practice of a trial court following,

> "an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside . . . (W)here the original conviction has been *set aside because of a constitutional error*. . . ." 395 U.S. at 724.

The RICE and PEARCE cases are readily distinguishable. Rice was tried *de novo* in the Buncombe County Superior

Court pursuant to N.C.G.S. §§ 15-177, 177.1, which under North Carolina's recently enacted District Court system, is provided for in N.C.G.S. 7A-290. Here, the inferior court conviction was not vacated by the Superior Court, nor did the Superior Court order a new trial; the Superior Court possesses no such authority. Nor was RICE required to attack or seek a reversal of his sentence in the General County Court, since trial *de novo* in the Superior Court is an absolute right even when the defendant pleads guilty in the lower court. STATE v. MEADOWS, 234 N.C. 657, 68 S.E. 2d 406 (1951); STATE v. BROOM, 269 N.C. 661, 153 S.E. 2d 384 (1967).

When an "appeal" is taken to the Superior Court, the case is, in the eyes of the State ". . . originally brought therein, . . . upon questions of law and fact, the judgment appealed from is completely annulled and *is not thereafter available for any purpose.*" STATE v. ANDERSON, 5 N.C. App. 614, 615, 196 S.E. 2d 38 (1969). See also STATE v. GOFF, 205 N.C. 545, 172 S.E. 407 (1934).

The type of case to which the PEARCE holding applies is obviously one which begins in the Superior Court, was appealed to an Appellate Court, and a new trial awarded *on a point of law*. The reversal and remand for a new trial usually involves the overruling of a trial judge on a point of law. In the present case, the "appeal" to the Superior Court for a jury trial *de novo* is a matter of right and does not involve reversal of the court below.

North Carolina District Courts do not provide for jury trials in criminal matters and transcripts are not available. *They are not courts of record.* The Superior Court tries the defendant *de novo* from the beginning to the end on both the law and the facts, without regard to the plea, trial, verdict or judgment in the District Court. To require a judge of the Superior Court to state new facts upon which his sentence was based imposes an impossible burden. There is no record from the court below and, therefore, there is no possible way a judge of the

Superior Court could review the evidence presented below. A requirement that the Superior Court judge state new facts upon which a greater sentence was based means that a Superior Court judge could never give a greater sentence after a jury trial *de novo* than that given by the District Court Judge sitting without a jury.

If such a theory controlled it would lead to ludicrous results and debilitate the machinery of criminal justice in North Carolina. If, as sometimes happens a defendant is found guilty of a misdemeanor and given only a warning, but decided he had been wronged in the lower court by a finding of guilt, he may appeal to the Superior Court as a matter of right. On his jury trial *de novo* in the Superior Court, the Superior Court judge would be forced to conduct a jury trial as to the issue of guilt alone. He would be bound by the lower court's warning and could not sentence the defendant when the facts of the case justified the imposition of a sentence. This example is not farfetched and would, in all probability, arise under the RICE decision.

In order to avoid such a result, there would be two alternatives. In the words of ALDRICH, C. J.:

> ". . . Either the district courts would tend to give maximum sentences out of caution, in the interest of the state, which, in turn, would have the effect of encouraging 'appeals,' or, if the district courts tended to give small sentences, the state would be led to avoid the vesting consequences by initiating cases in the Superior Court in the first instance. The state's two-step procedure has a legitimate purpose. We see no occasion for us to expose it to any such dilemma. Rather, we hold the defendant has no constitutional right to complain of a 'chilling effect' when, in effect, he need not stand in the draft in the first instance." LEMIEUX v. ROBBINS, supra, at 356.

The Superior Court tries the defendant *de novo* from the beginning to the end on both the law and the facts, without

regard to the plea, trial, verdict, or sentence in the District Court. Thus, the judge of the Superior Court is necessarily required to enter his own independent judgment, since the *de novo* trial in the Superior Court is without regard to the proceedings below. STATE v. MEADOWS, supra; STATE v. OVERBY, 4 N.C. App. 280, 166 S.E. 2d 461 (1969); DOSS v. NORTH CAROLINA, 252 F. Supp. 298 (M.D. N.C. 1966).

> ". . . Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to 'appeal' not only gives him a new trial but vacates the judgment and removes the entire case to the Superior Court . . . (S)hould he elect to take advantage of a second and fresh opportunity, it does not seem unfair to us that, absent affirmative proof of vindictiveness, they should start again at parity." LEMIEUX v. ROBBINS, supra, at 355.

If trial judges are as devious as the Respondent would lead this Court to believe, it would be a simple matter for them to deny future defendants the very rights which PEARCE purports to protect. In every case in which appeal seemed likely, the inferior court could simply sentence the defendant to the maximum sentence allowed for the offense. PEARCE would then be inapplicable to the trial *de novo* in the Superior Court. Certainly, such a practice would not enure to the benefit of future defendants.

Chief Judge Aldridge summed up the position of the State of North Carolina when he stated:

> "Looking at the total circumstances, where the State offers the defendant a full trial, with full right of appeal therefrom, in the Superior Court, we do not think it unreasonable for it to restrict the appeal from the district court in the sense here complained of." LEMIEUX v. ROBBINS, supra, at 356.

Or, as even more succinctly stated by this Court:

". . . the slate has been wiped clean . . . ." NORTH CAROLINA v. PEARCE, supra, at 721.

II.

The Fourth Circuit Court of Appeals opinion in RICE v. NORTH CAROLINA, supra, raises serious problems affecting the structure of criminal justice in a significant number of states.

The system of dual levels of court in which the defendant charged with a less serious offense is initially tried in a lower court before a judge (in North Carolina this includes traffic offenses, disorderly person violations and misdemeanors), is also in effect in at least 24 other states, and possibly more than presently revealed in our research.[1] If the Fourth Circuit's opinion in Rice stands, North Carolina, together with Arizona, Arkansas, Colorado, Florida, Indiana, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Texas, Utah, Virginia, Washington and West Virginia, will all be required to revise their judicial systems. It holds the promise of converting lower criminal trial courts, which now handle misdemeanor and other offenses within their

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1. ARIZONA—A.R.S. § 22-374; ARKANSAS—Ark. Stat. §§ 44-501, 502 and 509; COLORADO—Rule 37(f) COLO. Rules of Crim. Pro.; FLORIDA—Constitution of Florida, Art. V, §§ 11(2) and 6(3). See also F.S.A. §§§ 932.53, 54, 55 and 56; INDIANA—Burns' Ind. Stat. Ann. § 9-721. See also PEELE v. STATE, 161 Ind. 378, 68 N.E. 682, and HARLAN v. STATE, 190 Ind. 332, 130 N.E. 413; KANSAS—K.S.A. § 22-3610. See also STATE v. COULTER, 40 Kan. 87, 19 P. 368 (1888), and STATE v. FORNER, 32 Kan. 281, 4 P. 357 (1884); KENTUCKY—K.R.S. § 23.032 and Rule 12.06 Ky. Rules of Crim. Pro. See also DRESSMAN v. COMMONWEALTH, 204 Ky. 668, 265 S.W. 3 (1924); MAINE—Me. Rules of Crim. Pro., Dist. Ct. Rules 37(a) and 39(a), (b) and (c). See also LEMIEUX v. MAINE, 240 A. 2d 206 (Me. 1968) and LEMIEUX v. ROBBINS, 414 F. 2d 353 (1st Cir. 1969), cert. dnd. 397 U.S. 1017 (1970); MARYLAND—Baltimore City Municipal Code (Arts. 5 § 43, Ann. Code of Md., Vol. I, 1968 Replacement Vol.) and Art. 52 § 13(b), Ann. Code of Md., Vol. 5, 1968 Replacement Vol. See also Art. 26 § 156, Ann. Code of Md. Vol. 2, 1966 Replacement Vol., 1970 Cumm. Supp.; MICHIGAN—PEOPLE v. OLARY, 382 Mich. 559, 170 N.W. 2d 842 (1969); MINNESOTA—M.S.A. § 488.20 and §§§ 633.20, 21 and 22; MISSISSIPPI—Miss. Code §§ 1201 and 1202; MISSOURI—Supreme Court Rule 22 §§ 10 and 11; MONTANA—

jurisdiction, thereby alleviating court congestion,[2] into mere stepping stones to the superior court for criminal defendants charged with misdemeanor and other inferior offenses.

R.C.M. § 95-2009. See also WHITE SULPHUR SPRINGS v. VOISE, 136 Mont. 1, 343 P. 2d 855 (1959); NEVADA—Rule 76 Justices' Court Pro.; NEW HAMPSHIRE—STATE v. DESPRES, 107 N.H. 297, 220 A. 2d 758 (1966). See also N.H.R.S.A. §§§ 502.18, 502A:11 and 12, and 599:1; NEW MEXICO—N.M.S.A. §§6-15-3(a); NORTH DAKOTA—N.D. Cent. Code §§ 33-12-40 and 41; TEXAS—Vernon's Ann. Code of Crim. Pro. §§ 44.17 and 45.10; UTAH—Utah Code Ann. §§ 78-4-17 and 78-5-14. See also Utah Code Ann. §§ 77-57-43 and 77-27-2; VIRGINIA—Va. Code § 16.1-136. See also EVANS v. CITY OF RICHMOND, 210 Va. 403, 171 S.E. 2d 247 (1969); WASHINGTON—R.C.W. §§ 3.50.280 and 3.50.410. See also STATE v. HAGIMORI, 57 Wash. 623, 107 P. 855 (1910); WEST VIRGINIA—Constitution of W. Va., Article VII, § 28. See also W. Va. Code §§ 50-18-1 and 50-18-10 STATE v. KESSINGER, 144 W. Va. 209, 107 S.E. 2d 367 (1959).

2. For example, according to data supplied by the Administrative Office of the Courts of the State of North Carolina*, for the 1970 calendar year, the Superior Courts of 83 of the 100 counties of the State of North Carolina tried 29,159 criminal cases, of which 16,751 were trials *de novo* from the District Courts. In other words, 57.4% of all criminal trials in the Superior Courts of North Carolina were upon trial *de novo*.

During 1970, the District Courts of the 83 counties in which the new District Court system had already been implemented, tried 342,327 cases, of which 16,751 were "appealed" for trial *de novo* in the Superior Court. (The figure of 342,327 includes only cases which were actually tried; and excludes cases disposed of by waiver, preliminary hearing, nol pros, or otherwise.) Of the cases tried in the District Courts, 4.89% were "appealed" to the Superior Court for trial *de novo*.

Using the 1970 statistics as an indicator, it is possible to project the impact upon the Superior Court of any increase in the number of cases "appealed" from the District Court for trial *de novo*. An increase of 1% in the number of cases "appealed" from the District Court would add 3,423 cases to the Superior Court criminal docket. An addition of 3,423 cases constitutes an increase of 12% in the Superior Court docket. The ratio between an increase in cases "appealed" from the District Court and the consequent increase in the Superior Court criminal docket is 1 to 12. If cases "appealed" from the District Court increased by 5%, the case load of the Superior Court would increase by 60%; *if cases appealed from the District Court increased by 10%, the case load of the Superior Court would increase by 120%.*

*This data is taken from the annual report of the Administrative Office of the Courts, 1970, and from reports submitted to the Administrative Office by the Clerks of Superior Court. These statistics relate to the 1970 calendar year and cover only the 83 counties of the State then under the District Court system. On December 7, 1970, the remaining 17 of the State's 100 counties came under the new District Court system.

Defendants will have everything to gain if with no added exposure they congest already crowded Superior Court criminal dockets and frustrate all efforts to implement the constitutional mandate of speedy trial in the criminal trial courts.

It is logical to anticipate and should be presumed, that upon jury trials *de novo* in the Superior Court more evidence is presented than was presented in the lower court. Jury trials in the Superior Court tend to result in better preparation, more evidence, more witnesses, and more extensive cross-examination, than do trials in the inferior court. If the judge of the Superior Court cannot impose a greater sentence when such a sentence is demanded by the facts and, is within the range of punishment prescribed for the offense, all defendants would "appeal" to the Superior Court in order to obtain a second opportunity for determination of guilt or innocence. This automatic two-step trial procedure would result in the District Court system serving no useful purpose and totally frustrating the intent of its creation, i.e., that of alleviating court congestion. If the slate is wiped clean, then the State and the defendant should start at parity.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals in the application of the PEARCE doctrine in this case extends well beyond the intent of this Court. It is clear that this Court's holding in PEARCE did not invision the factual situation of the case at bar. This matter is governed by a statutory procedure and is not the type of "new trial" to which the holding in PEARCE applies.

For the foregoing reasons, we respectfully submit that this case should be reversed and remanded to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ROBERT MORGAN
Attorney General

JACOB L. SAFRON
Assistant Attorney General

EDWARD L. EATMAN, JR.
Staff Attorney

P. O. Box 629
Justice Building
Raleigh, North Carolina 27602

Telephone 829-7188

COUNSEL FOR PETITIONER